



Arizona Department of Agriculture Office of Pest Management

1688 W. Adams Street, Phoenix, Arizona 85007
(602) 255-3664 FAX (602) 542-0466

March 19, 2013

CITATION
Case #100360

Truly Nolen (Business Licensee # 4020)
Robert Hartley (Qualifying Party # 674)
Tammy Pyeatt (Applicator # 080614)
Timothy Warren (Applicator # 060445)

The Office of Pest Management (OPM) filed a complaint against the respondents for failing to complete pretreatment tags and failing to apply the correct quantity of termiticide to a pretreatment site. Additionally, Truly Nolen failed to complete final grades within 12 months of the original pretreatment.

On 4-12-12, while performing a consumer protection monitor in Flagstaff, Arizona, OPM Inspector Norman Maeser noted that a site recently pretreated by Truly Nolen was void of a pretreatment tag. Inspector Maeser reviewed the treatment records at the Truly Nolen branch office and noted that one of the records listed an address number and street name that conflicted with the actual address. When OPM Inspector Maeser interviewed applicator Timothy Warren to ascertain the whereabouts of the pretreatment tag, Mr. Warren stated he attached the pretreat tag to a piece of rebar in a dirt area after he completed the pretreatment. Inspector Maeser explained that, according to the Arizona Administrative Code (AAC), the tags must be posted conspicuously.

On 4-16-12, Inspector Maeser inspected another pretreatment site (an apartment complex). Mr. Warren and Ms. Pyeatt, the pretreatment supervisor, were also present. Inspector Maeser noted that while Mr. Warren pretreated the site on 4-13-12, he did not leave a pretreatment tag at all, because, according to him, he had "not completed the application." Inspector Maeser again referred the posting requirements in the AAC, which required Mr. Warren to document that the treatment was "incomplete" and conspicuously attach it to the site. Mr. Warren stated he was unaware of that requirement.

Inspector Maeser observed another pretreatment tag on the same property, which was missing the business license address, type of slab, and the name and license number of the applicator.

On 4-26-12, Truly Nolen's Qualifying Party Robert Hartley provided a transcript of training records.

On 5-2-12, Inspector Maeser returned to the apartment complex pretreatment site and noted three additional tags that were missing the business address and applicator name and license number; this issue had been previously discussed with Mr. Warren and Ms. Pyeatt. On a fourth tag, Mr. Warren did place the words "not complete" on a property he did not completely pretreat. However, the address of the business licensee, address of the project, type of slab and the name and license number of the applicator were missing.

One site treated by Mr. Warren at "857 Heron Drive" consisted of 2,282 square feet and 196 linear feet. Mr. Warren applied 500 gallons. Mr. Warren stated he applies the termiticide at double the concentration, half the gallons. Had Mr. Warren performed the pretreatment at the standard rate of 1 gallon per 10 square foot and 4 gallon per 10 linear foot, he would have been required to apply 306.6 ($2,282/10$ square feet = 228.2 gallons; $196 \text{ feet} / 10 \text{ linear feet} \times 4 \text{ gallons per } 10 \text{ linear feet} = 78.4 \text{ gallons}$; $228.2 + 78.4 = 306.6$ gallons finished product). If he actually did only "double" the concentration, he would have been required to apply 153.3 gallons. In either case, Mr. Warren over-applied by the minimum of 193.4 gallons.

On another site identified as "1000 Sawmill/Windsor Building 10", Mr. Warren's treatment records indicated a total square footage of 6800 and total linear footage of 413 with two treatments being performed at 150 gallons each, which totals 300 gallons. However, Inspector Maeser measured the property and calculated it as 6330.5 square feet, 247.91 linear feet, which, using the "double" concentration method, would have required 366.1 gallons ($6330.5 / 10$ square feet $\times \frac{1}{2}$ gallon per square foot = 316.42 gallons; $247.91 \text{ linear feet} / 10 \text{ linear feet} \times 2 \text{ gallons to } 10 \text{ linear feet} = 49.58 \text{ gallons}$; $316.52 + 49.58 = 366.1$ gallons of finished product). Therefore, Mr. Warren under applied by a minimum of 66.1 gallons.

There is no evidence that this over-application or shortage occurred as a result of a lack of training on the part of Ms. Pyeatt or Mr. Hartley.

During this investigation, Inspector Maeser also noted three pretreatments which occurred on 2-15-09, 7-1-09, and 8-29-11, respectively, that did not receive a final grade within 12 months from the date of the pretreatment as required by law.

This citation does not include a violation for incorrect records found at the Truly Nolen office as such issues were addressed during the initial visits, which are considered Compliance Assistance visits.

As a result of the OPM's investigation, the Acting Director of the Office has determined that you have committed the following violation(s):

I. VIOLATIONS

1. Timothy Warren failed to apply proper quantity, strength and dosage and treat critical areas.

A.A.C. R4-29-305(C) ("An applicator shall apply a termiticide only in the quantity, strength, and dosage, and in the manner prescribed on the termiticide label")

A.A.C. R4-29-601 ("A business licensee shall comply with every provision in Article 3 regarding applicator duties and responsibilities.")

A.A.C. R4-29-501 ("A qualifying party shall comply with every provision in Article 3 regarding applicator duties and responsibilities.")

2. Timothy Warren, Tammy Pyeatt, Robert Hartley and Truly Nolen failed to complete pretreatment tags.

A.A.C. R4-29-305(D)(6) ("Immediately after completing a pretreatment, an applicator shall securely affix a tag to the pretreatment site. The applicator shall ensure that the tag is visible, readily available for inspection, and unlikely to be covered with concrete or soil. If there is a contractor's permit or inspection board at the pretreatment site, the applicator may affix the tag to the board. The applicator shall ensure that the tag contains the following information about the pretreatment: ... Address of business; licensee; ... Location or address of project; ... Type of slab construction; ... Name of applicator; ... License number of applicator")

A.A.C. R4-29-501 ("A qualifying party shall comply with every provision in Article 3 regarding applicator duties and responsibilities.")

A.A.C. R4-29-601 ("A business licensee shall comply with every provision in Article 3 regarding applicator duties and responsibilities.")

3. Truly Nolen failed to complete final grade treatments within 12 months.

A.R.S. § 32-2321(B)(13) ("The following acts are grounds for disciplinary action: ... Failure to establish a complete vertical barrier ... within 12 months of the original treatment made before or during construction.")

A.A.C. R4-29-608(B) ("A business licensee that performs a pretreatment ... shall establish vertical barriers at the exterior ... after all grading and other construction-related soil disturbance is complete.")

II. ORDER

- A. It is ORDERED that Truly Nolen, BUS LIC #4020, be issued an **Administrative Warning and complete all final grade treatments** for every address (that did not receive a final grade treatment within 12 months of the pretreatment) **within 3 months** of the effective date of this Order and **send the OPM (attention "Vince Craig, Case #100360") a list of those properties as well as confirmation that they were treated.**
- B. It is ORDERED that Robert Hartley, QP LIC #674, be issued an **Administrative Warning.**
- C. It is ORDERED that Tammy S. Pyeatt, APP LIC #080614, be issued an **Administrative Warning.**
- D. It is ORDERED that Timothy Warren, APP LIC #060445, be issued an **Administrative Warning, pay a \$100.00 civil penalty and obtain 2 hours of continuing education (CE) in the topics of pretreatments, calculations, or record keeping (or a combination of two of the courses) due within 30 days of the date of the Order. The CE shall be separate from that required for license renewal pruposes.**

This Citation and Order shall automatically take effect thirty one days after receipt if you have not properly exercised your right to request an opportunity for a formal hearing. See A.R.S. §§ 32-2321 & 41-1092.03(B). Your right to a request an opportunity for a formal hearing is set out below. If you do not request an opportunity for a hearing by contesting this Citation and Order, this Citation and Order will serve as the Final Decision and Order of the Acting Director without any additional notification being sent to you.

Right to a Hearing

Pursuant to Title 41, Chapter 6, Article 10, A.R.S. § 41-1092 et seq., you have the right to request a hearing to contest any of the above charges and/or associated penalties. Your hearing request must be filed within 30 days of receipt of this citation. Please note that if you request a formal hearing, the Office of Pest Management will schedule the hearing before the Office of Administrative Hearings and the hearing will be presided over by an administrative law judge. After you request a hearing, the Office of Pest Management will serve a Notice of Hearing on you, and you will have 20 days to file a written answer. A.A.C. R4-29-705(C). If you request a hearing, you also have the right to request an informal settlement conference pursuant to A.R.S. § 41-1092.06.

41-1092.03. Notice of appealable agency action or contested case; hearing; informal settlement conference; applicability

A. Except as provided in subsection D of this section, an agency shall serve notice of an appealable agency action or contested case pursuant to section 41-1092.04. The notice shall:

1. Identify the statute or rule that is alleged to have been violated or on which the action is based.
2. Identify with reasonable particularity the nature of any alleged violation, including, if applicable, the conduct or activity constituting the violation.
3. Include a description of the party's right to request a hearing on the appealable agency action or contested case.
4. Include a description of the party's right to request an informal settlement conference pursuant to section 41-1092.06.

B. A party may obtain a hearing on an appealable agency action or contested case by filing a notice of appeal or request for a hearing with the agency within thirty days after receiving the notice prescribed in subsection A of this section. The notice of appeal or request for a hearing may be filed by a party whose legal rights, duties or privileges were determined by the appealable agency action or contested case. A notice of appeal or request for a hearing also may be filed by a party who will be adversely affected by the appealable agency action or contested case and who exercised any right provided by law to comment on the action being appealed or contested, provided that the grounds for the notice of appeal or request for a hearing are limited to issues raised in that party's comments. **The notice of appeal or request for a hearing shall identify the party, the party's address, the agency and the action being appealed or contested and shall contain a concise statement of the reasons for the appeal or request for a hearing.** The agency shall notify the office of the appeal or request for a hearing and the office shall schedule an appeal or contested case hearing pursuant to section 41-1092.05, except as provided in section 41-1092.01, subsection F.

C. If good cause is shown an agency head may accept an appeal or request for a hearing that is not filed in a timely manner.

D. This section does not apply to a contested case if the agency:

1. Initiates the contested case hearing pursuant to law other than this chapter and not in response to a request by another party.

2. Is not required by law, other than this chapter, to provide an opportunity for an administrative hearing before taking action that determines the legal rights, duties or privileges of an applicant for a license.

41-1092.06. Appeals of agency actions; informal settlement conferences; applicability

A. If requested by the appellant of an appealable agency action or the respondent in a contested case, the agency shall hold an informal settlement conference within fifteen days after receiving the request. A request for an informal settlement conference shall be in writing and shall be filed with the agency no later than twenty days before the hearing. If an informal settlement conference is requested, the agency shall notify the office of the request and the outcome of the conference, except as provided in section 41-1092.01, subsection F. The request for an informal settlement conference does not toll the sixty day period in which the administrative hearing is to be held pursuant to section 41-1092.05.

B. If an informal settlement conference is held, a person with the authority to act on behalf of the agency must represent the agency at the conference. The agency representative shall notify the appellant in writing that statements, either written or oral, made by the appellant at the conference, including a written document, created or expressed solely for the purpose of settlement negotiations are inadmissible in any subsequent administrative hearing. The parties participating in the settlement conference shall waive their right to object to the participation of the agency representative in the final administrative decision.



Jack Peterson, Acting Director

4/15/13

Date

To file a request for hearing with the Office of Pest Management, you must file a letter requesting a hearing, within thirty (30) days after receipt of this notice addressed to:

Jack Peterson, Acting Director
Arizona Office of Pest Management
1688 W. Adams
Phoenix, AZ 85007

OR to request by FAX:

Attention: Jack Peterson, Acting Director
FAX (602) 542-0466

The Request for Hearing must include the following:

- The contesting party
- The party's address
- The specific action being contested
- A concise statement of the reasons for the request for a hearing